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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK DESHONE GRAHAM,

Defendant and Appellant.

E057103

(Super.Ct.No. SWF1101385)

OPINION

APPEAL from the Superior Court of Riverside County. Christine V. Pate, Judge.
(Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part, modified with
directions.

Kessler & Seecof and Daniel J. Kessler, under appointment by the Court of
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney
General, Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Derrick Deshone Graham was a member of a gang called the Edgemont Criminals. During a routine traffic stop of a car he was driving, the police found an “eight ball” of methamphetamine inside a laptop case on the passenger seat.

A jury found defendant guilty as follows:

Count 1: Possession of a controlled substance for sale (Health & Saf. Code, § 11378), with a prior drug-related conviction enhancement (Health & Saf. Code, § 11370.2, subd. (c)) and a gang enhancement (Pen. Code, § 186.22, subd. (b)).

Count 2: Transportation of a controlled substance (Health & Saf. Code, § 11379), with a prior drug-related conviction enhancement (Health & Saf. Code, § 11370.2, subd. (c)) and a gang enhancement (Pen. Code, § 186.22, subd. (b)).

Count 3: Active participation in a gang (Pen. Code, § 186.22, subd. (a)).

Defendant admitted one “strike” prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and one prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)). At sentencing, however, the trial court struck the strike prior. It also struck the punishment on the gang enhancements. (See Pen. Code, § 186.22, subd. (g).)

As a result, defendant was sentenced to a total of 11 years in prison, along with the usual fines, fees, and conditions.

Defendant now contends:

1. There was insufficient evidence that defendant promoted, furthered, or assisted in felonious criminal conduct by other gang members to support his conviction for active gang participation. (Pen. Code, § 186.22, subd. (a).)

2. The trial court erred by denying defendant's motion for acquittal (Pen. Code, § 1118.1) on the gang enhancements.

The People concede the first assignment of error; we concur with the second. Accordingly, we will modify the judgment by striking the conviction on count 3 and by striking the gang enhancements. These modifications also require striking the prior serious felony enhancement.

I

FACTUAL BACKGROUND

A. *Evidence of Possession of Methamphetamine for Sale.*

On May 31, 2011, Hemet Police Officer Rene McNish made a routine traffic stop of a car that defendant was driving. Defendant consented to a search of the car. In the front passenger seat, Officer McNish found a laptop bag. Inside the laptop bag, he found (along with a laptop and other items) a ziplock baggie containing 3.5 grams of methamphetamine and a digital scale.¹ Defendant also had a Los Angeles Angels money clip.

¹ Officer McNish gave the weight of the methamphetamine as 3.5 grams. When analyzed, it was found to weigh only 2.72 grams. However, Officer McNish may have weighed it with its packaging. Moreover, he conducted a field test of the methamphetamine, which would have consumed some of it.

Defendant asked the police to release his personal property to a family member named Toya Sweeney. To obtain the release, he signed an indemnity agreement stating that he was the owner of the items to be released, specifically including the laptop bag as well as noncontraband items found in the laptop bag.

Officer McNish testified that, in his opinion, the methamphetamine was possessed for the purpose of sale, because: (1) the amount of methamphetamine was 3.5 grams, which is an “eight ball,” worth \$200 to \$500, whereas a normal dose would be just 0.1 to 0.5 grams; (2) defendant was in possession of a scale; (3) defendant was in possession of almost \$230 in cash, mostly in \$20 bills; (4) defendant received approximately nine incoming calls on his cell phone in some two to four hours; (5) defendant was not in possession of any paraphernalia; (6) defendant was not under the influence; and (7) defendant did not appear to be employed.

B. *Gang Evidence.*

Defendant was a member of the Edgemont Criminals (Edgemont), with the moniker “Day One.” Edgemont was a gang based in Moreno Valley. Starting around 2004, it expanded into San Jacinto and Hemet.

One of the many items of evidence on which the expert relied was defendant's Los Angeles Angels money clip. He explained that one of the signs or symbols that Edgemont uses is the letter A, referring to Adrienne Street. Thus, the gang also uses clothing and other items featuring logos of the Los Angeles Angels, the Oakland A's, and the Atlanta Braves.

Edgemont's primary activities were burglaries, robberies, and sales of cocaine, methamphetamine, and marijuana.

A pattern of criminal gang activity was shown by the following convictions:

1. On September 27, 2006, Reginald Alexander, a member of Edgemont, was convicted of selling cocaine. The crime was committed on February 15, 2006.

2. On October 12, 2006, defendant was convicted of selling cocaine base. The crime was committed on January 18, 2006.

3. On October 30, 2007, Lavell Harthon, a member of Edgemont, was convicted of possession of marijuana for sale. The crime was committed on January 30, 2007.

4. On an unspecified date,² Geuka Jackson, a member of Edgemont, was convicted of transportation of cocaine and possession of marijuana for sale. The cocaine offense was committed on September 3, 2007. The marijuana offense was committed on a later but unspecified date.

² The date was shown by an exhibit, but the exhibit has not been transmitted to us.

5. On August 25, 2011, Trevor Williams, a member of Edgemont, was convicted of possession of Ecstasy for sale. The crime was committed on December 14, 2010.

A gang expert testified (in hypothetical form) that defendant was in possession of methamphetamine for the purpose of furthering, promoting, or assisting criminal conduct by gang members.

C. *Defense Evidence.*

Defendant testified that he had not been an active member of Edgemont since at least 2009.

Both defendant and Nicole Brown-Lord, his ex-girlfriend and the mother of his children, testified that the methamphetamine belonged to Brown-Lord and that defendant had no way of knowing that it was in the laptop bag.

II

THE SUFFICIENCY OF THE EVIDENCE OF ACTIVE GANG PARTICIPATION

Defendant contends that there was insufficient evidence that he assisted in felonious criminal conduct by *other* gang members to support his conviction for active gang participation. (Pen. Code, § 186.22, subd. (a).)

The People concede the error. We agree. Under *People v. Rodriguez* (2012) 55 Cal.4th 1125,³ a conviction for active gang participation requires evidence that the defendant committed a felony with at least one other gang member. Here, the only evidence that defendant had committed a felony was the same as the evidence that he

³ In fairness to the trial court, we note that *Rodriguez* was not decided until after defendant's conviction.

possessed and transported methamphetamine. There was no evidence that he did so with any other gang member.

III

THE MOTION FOR ACQUITTAL ON THE GANG ENHANCEMENTS

Defendant contends that the trial court erred by denying his motion for acquittal (Pen. Code, § 1118.1) on the gang enhancements.

A. *Additional Factual Background.*

In response to a hypothetical based on the facts of this case, the gang expert opined that the drug crimes were committed “to further[,] promote[,] or assist criminal conduct by gang members and for the benefit of the . . . gang.”

He explained, “. . . Edgemont . . . has a long history of selling narcotics. . . . [T]hey have used those proceeds either . . . to maintain their own lifestyle or . . . [to] purchase weapons to use against rival members.”

“That benefit also extends into expanding the criminal enterprise of this particular gang. . . . [¶] . . . [I]t has the effect of expanding . . . the turf area and the criminal enterprise of this particular gang.”

He also explained: “[A]ssociation doesn’t just mean that you and I as gang members associating together go out and commit a crime, it also means that as an individual gang member, . . . I’m going out and committing a crime in association with my gang as a member of my gang showing my allegiance to my gang by doing one of the primary activities of that gang. . . . [¶] . . . [D]rug dealing is . . . different than an

immediate crime of opportunity like a robbery . . . or shoplift which really doesn't take any direction or planning. . . . It takes time to plan it, get the drugs, get the source bag, get the scale, get the cell phone, make your contacts on the street, establish your drug sales operation. All that takes direction, planning, whether you're doing it alone as an active member of the gang or doing it as a group"

In response to a hypothetical, the expert testified that a gang member who shoplifts a pair of jeans from a Wal-Mart would be benefiting the gang: "Each time that a gang member goes out and commits a crime, does something that enhances their criminal sophistication, their experience, . . . that all goes towards their rank, their status, their respect in gang culture. The more criminally sophisticated a person is and the more experience they get committing crimes, whether it be stealing jeans, selling dope, being a gunner or a shooter for a gang, each time they do that, they get better at doing it, they start teaching other gang members doing it. [¶] So . . . now I know I can go into Wal-Mart and steal some stuff. Maybe I'm going to tell my home boys that this Wal-Mart is an easy mark; . . . there's no cameras in this particular part." "It's that personal experience of getting better at what you do, enhancing your criminal sophistication."

The expert conceded that not every crime committed by a gang member is committed for the benefit of the gang. For example, if a "gangster" buys "a little nickel sack of weed, that's not necessarily . . . for the benefit of the gang." Likewise, "[d]riving without a license is a crime but that wouldn't necessarily benefit the gang."

On cross-examination, the expert admitted that he had no way of knowing whether the gang had actually supplied defendant with drugs; whether the gang had actually authorized defendant to sell drugs in the area; whether defendant had actually provided drug proceeds to the gang; or whether defendant had actually used drug proceeds to buy a weapon.

B. *Additional Procedural Background.*

After the close of the prosecution's case-in-chief, defense counsel made a motion for acquittal on, among other things, the gang enhancements. He argued that there was insufficient evidence of defendant's intent. The trial court denied the motion.

When defendant took the stand, he made some admissions that were arguably relevant to the gang enhancements. However, because defendant is challenging the trial court's ruling on his motion for acquittal, we confine our review to the evidence presented in the prosecution's case-in-chief. (*People v. Butler* (2012) 212 Cal.App.4th 404, 420.)

C. *Analysis.*

Preliminarily, on our own motion, we considered whether this issue was moot, in light of the fact that, at sentencing, the trial court struck the gang enhancements. It stated, however, that it was striking these enhancements solely "for sentencing purposes." The enhancement findings themselves remained in effect. Indeed, it is arguable that the trial court did not have the authority to strike the enhancement findings. (See *People v. Campos* (2011) 196 Cal.App.4th 438, 452-454; see also Pen. Code, § 186.22, subd. (g).)

Thus, defendant’s position is analogous to that of a person who has been convicted of a crime but has served his or her sentence. It appears to be the law in California that a person who has been released from custody can still prosecute an appeal from the conviction, if only to clear his or her name. (*People v. Delong* (2002) 101 Cal.App.4th 482, 487-489; *In re Dana J.* (1972) 26 Cal.App.3d 768, 771; see also *Ex parte Byrnes* (1945) 26 Cal.2d 824, 827 [habeas].) Even assuming the person must also show that he or she is subject to adverse collateral consequences (see *People v. Delong, supra*, 101 Cal.App.4th at p. 492), here the gang enhancements could be used against defendant as collateral estoppel in a future proceeding. (See *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1046.) We conclude that this issue is not moot. We therefore turn to the merits.⁴

“‘[W]hen a defendant challenges the sufficiency of the evidence, “[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” [Citations.] . . .

“Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]” [Citation.] We ““presume in support of the judgment the existence of every fact the trier could reasonably deduce from the

⁴ The People do not challenge the proposition that a motion for acquittal can be brought with respect to a gang enhancement. (Cf. *People v. Norris* (2002) 95 Cal.App.4th 475, 478–479.) We deem them to have forfeited any such challenge.

evidence.” [Citation.]” [Citation.]’ [Citation.]” (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069.)

A gang enhancement requires that the defendant commit the underlying crime (1) “for the benefit of, at the direction of, or in association with a[] criminal street gang” and (2) “with the specific intent to promote, further, or assist in any criminal conduct by gang members” (Pen. Code, § 186.22, subd. (b).)

“‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) However, “[t]he record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.’ [Citation.]” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 [Fourth Dist., Div. Two], italics omitted.)

Here, the expert stated essentially five reasons for his opinion.

First, he stated that gang members use drug proceeds to buy weapons. He admitted, however, that they also use drug proceeds for purely personal purposes: “[M]ost gang members don’t work and they will use crimes to finance their lifestyle, put money in their pocket. . . . [T]hey’ll . . . put food in their stomach and use the money to live.” He did not give the jury any reason to conclude that, in this case, the drug proceeds would have gone toward weapons rather than food. When asked, “You don’t have any

information to say that Mr. Graham has ever once bought a weapon as a result of obtaining drug money?,” he answered, “That is correct.”

Second, he stated that the commission of a crime can expand a gang’s turf area. Here, however, defendant was found with drugs in his car while driving through Hemet. There was no evidence as to where he intended to sell the drugs. The gang expert testified that Edgemont had been active in Hemet since 2004, and “off the top of [his] head,” he could think of four or five other Edgemont members who also lived in Hemet. While there was testimony that Edgemont had a rival gang or gangs in Moreno Valley, there was no evidence of any particular contest over turf in Hemet.

Third, he stated that, any time a gang member commits a crime that is one of the primary activities of the gang, he is “showing . . . allegiance” to the gang and therefore associating with the gang. This makes sense, however, only if the connection between the gang and the defendant’s particular crime is made manifest to others. Here, there was no evidence that defendant’s drug customers knew that he was a member of Edgemont. In fact, the expert admitted, “. . . I’ve never seen a gangster sell somebody some dope and then go, yeah, that’s on Edgemont. Normally . . . where people throw up their sign or . . . where they shout their gang name is during a fight or some other type of violence In terms of . . . drug sales, I haven’t really seen that” Likewise, there was no evidence that defendant’s fellow gang members knew that he was selling drugs. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [insufficient evidence that crime was committed to gain respect where shooters did not claim gang during shooting or brag

about shooting afterward].) As we stated in *Ochoa*: “[A]lthough all gangs regularly commit certain crimes, the fact that an individual gang member commits one of those crimes by himself is not substantial evidence that he did so for the benefit of, at the direction of, or in association with the gang, even if it is the gang’s ‘signature’ crime.” (*People v. Ochoa, supra*, 179 Cal.App.4th at p. 661, fn. 7.)

The expert did *not* testify that defendant’s possession of a Los Angeles Angels money clip supported his opinion that the crime was committed for the benefit of the gang. There is no evidence that defendant ever displayed it or would have displayed it to customers. Moreover, while there was evidence that the Los Angeles Angels logo was one of many identifying symbols that Edgemont members use, any number of non-gang members also display the same logo. There was no evidence that defendant’s possession of the money clip alone would have been understood as a claim of allegiance to the gang.

Fourth, the expert stated that drug dealing takes “direction” and “planning.” He added, however, that this is true “whether you’re doing it alone . . . or doing it as a group” He conceded that he did not know whether defendant had gotten the drugs from his gang. Thus, again, he gave the jury no basis to conclude that, in this particular instance, defendant was working for the benefit of, at the direction of, or in association with his gang.

Fifth, he stated that, every time a gang member commits a crime, it enhances his “criminal sophistication.” He added, however, that this is a benefit to the gang member himself: “It’s that personal experience of getting better at what you do” Admittedly, he stated that the gang member may “start teaching other gang members” However, there was no evidence that there was anything about defendant’s current crime that was novel or worth teaching to others. Absent such evidence, this theory of benefit would seem to apply to every crime a gang member commits — even buying “a little nickel sack of weed” or “[d]riving without a license.” On this record, it would be purely speculative to conclude that the crime was committed to enhance the criminal sophistication of the gang as a whole rather than defendant’s own personal criminal sophistication.

We therefore conclude that the trial court should have granted the motion for acquittal on the gang enhancements.

IV

DISPOSITION

The judgment is modified by striking the gang enhancements to counts 1 and 2, reversing the conviction on count 3, and striking all related sentencing terms.⁵ Because we are reversing the conviction on count 3, defendant is no longer subject to the prior

⁵ One stricken sentencing term is the requirement that defendant register pursuant to Penal Code section 186.30. It appears that he is already required to register due to a prior conviction; if so, this disposition has no effect on that preexisting requirement.

serious felony enhancement (See Pen. Code, § § 667, subd. (a)(1), 1192.7, subd. (c)), which is also stricken. The total sentence is therefore six years. As thus modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended sentencing minute order and an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.